BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES E. EAKER	)	
Claimant	)	
VS.	)	
	)	Docket No. 219,173
PROFICIENT FOOD COMPANY	)	
Respondent	)	
AND	)	
	)	
TRANSPORTATION INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appealed the Award dated August 31, 1998, and Order Nunc Pro Tunc dated September 8, 1998, entered by Administrative Law Judge Julie A. N. Sample. The Appeals Board heard oral argument on March 16, 1999.

APPEARANCES

Michael R. Wallace of Shawnee Mission, Kansas, appeared for the claimant. Michael T. Halloran of Leawood, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant initially injured his left upper extremity at work. Thereafter, he developed problems on the right. The Administrative Law Judge found claimant's right upper extremity complaints were the natural and probable consequence of the injury on the left and awarded benefits based upon a whole body disability. Respondent disputes the 54.5 percent work disability award arguing that its liability is limited to an award for a scheduled injury to the left upper extremity. Claimant contends the work disability should be higher than that awarded by the ALJ. On appeal, the nature and extent of claimant's injury and disability is the only issue.

In its Application for Review respondent also raised an issue concerning claimant's average weekly wage. During oral argument, however, that issue was withdrawn. Respondent also withdrew its objection to the ALJ's issuance of an Order Nunc Pro Tunc.

FINDINGS OF FACT

On October 19, 1994, claimant injured his left wrist at work. The parties agree this injury arose out of and in the course of claimant's employment with respondent. Authorized medical treatment was provided.

Claimant was eventually referred to Fred M. Wood, M.D. Dr. Wood diagnosed a full thickness tear of the scapholunate ligament and a peripheral tear of the triangular fibrocartilage. These were repaired by arthroscopic surgery which was then followed by a period of physical therapy. On February 16, 1996 Dr. Wood released claimant to return to work without restrictions. Dr. Wood rated claimant's functional impairment as 7 percent to the left upper extremity.

Claimant did not return to work with respondent because he did not think he was capable of performing his former job duties. In March 1996 claimant obtained a new job through his union as a boilermaker performing high pressure welding. Claimant modified his work habits by using his right arm more to compensate for the injury to his left wrist. Although claimant testified he reported symptoms with his right upper extremity to Dr. Wood, there is no mention of any such complaints in Dr. Wood's records. Dr. Wood was not deposed.

If claimant had any right-sided symptoms while he was treating with Dr. Wood, they must have resolved because when claimant was seen by Lynn D. Ketchum, M.D., for a court-ordered independent medical examination on July 9, 1997, claimant reported that his right elbow had been giving him problems for a couple of months. At the time claimant was first examined by Dr. Ketchum, he had been working as a boilermaker for a year and four months. In Dr. Ketchum's opinion, claimant's right elbow symptoms began a few months before his July 9, 1997 examination. Claimant was released by Dr. Wood on February 16, 1996[1] and claimant had not worked for respondent since October 19, 1994.

Dr. Ketchum recommended treatment. He last saw claimant on February 11, 1998. He assigned claimant a 10 percent functional impairment rating of the right upper extremity and a 15 percent rating to the left upper extremity. He also assigned restrictions of no repetitive gripping more than 50 percent of the time and no lifting over 50 pounds.

Dr. Ketchum opined that "the symptoms of his [claimant's] right upper extremity, namely mild radial tunnel syndrome and mild lateral humeral epicondylitis, are compatible

[1] But Dr. Wood's records show he continued seeing claimant through November 8, 1996.

with an overuse syndrome on the right from favoring the left side, although it may just be a sequelae of his work as a boilermaker as well." Dr. Ketchum agreed that claimant's work as a boilermaker exceeded his restrictions and that the work itself was sufficient to cause the conditions he diagnosed in claimant's right upper extremity even absent a prior injury to the left upper extremity.

The Appeals Board finds that claimant's right upper extremity complaints began after he started his subsequent job as a boilermaker and his current right upper extremity condition would not have occurred absent the heavy work he performed at that job.

CONCLUSIONS OF LAW

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[2] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[3] The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.[4]

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[5] It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.[6] The Appeals Board finds that claimant's work as a boilermaker following his release by Dr. Wood was an intervening cause of his worsened condition. The right upper extremity injury, therefore, constitutes a new accidental injury and is not compensable as a direct and natural consequence of the original injury to the left upper extremity. Because claimant's injury is compensable as a scheduled injury to the left forearm and not as a disability to the body as a whole, the Appeals Board does not reach the question of work disability.

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[2] K.S.A. 44-501(a); see also Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

[3] K.S.A. 44-508(g). See also *In re* Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 44-501(g).

[5] Jackson v. Stevens Well Service, 208 Kan. 637, 643, 493 P.2d 264 (1972).

[6] Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997). See also Bradford v. Boeing Military Airplanes, 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1082 (1996).

Dr. Wood was the only physician to rate claimant's impairment before claimant's subsequent job as a boilermaker. Therefore, his 7 percent rating to the forearm will be adopted.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated August 31, 1998, and Order Nunc Pro Tunc dated September 8, 1998, entered by Administrative Law Judge Julie A. N. Sample should be, and are hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, James E. Eaker, and against the respondent, Proficient Food Company, and its insurance carrier, Transportation Insurance Company, for an accidental injury which occurred October 19, 1994. Claimant is entitled to 73 weeks of temporary total disability compensation at the rate of $319 per week or $23,287.00, followed by 8.89 weeks at the rate of $319 per week or $2,835.91, for a 7% scheduled injury to the forearm, making a total award of $26,122.91, which is ordered paid in one lump sum less any amounts previously paid.

The Board hereby adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority and would affirm the Award. The injury to the right arm is a natural and probable consequence of the left arm injury as it occurred in the usual and expected course of events.[7] It is reasonably anticipated that a worker may over use an arm by protecting the other.

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Shawnee Mission, KS
Michael T. Halloran, Leawood, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director

[7] See State Farm Mutual Automobile Ins. Co. v. Cromwell, 187 Kan. 573, 358 P.2d 761 (1961) and Rowell v. City of Wichita, 162 Kan. 294, 176 P.2d 590 (1947), where the Court defines natural and probable consequences as those which human foresight can anticipate because they happen so frequently they may be expected to recur.